IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 169 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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COMMISSIONER OF INCOME-TAX

Versus

FABRIQUIP PVT LTD

Appearance:

1. INCOME TAX REFERENCE No. 169 of 1988
MR BB NAIK for Petitioner No. 1
MR BD KARIA for MR RK PATEL for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 05/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

The assessee was a wholly owned subsidiary of M/s.Elscope Pvt. Ltd.. On 1-3-1977, the assessee had sold its undertaking to M/s.Elscope Pvt. Ltd. under certain terms and conditions mentioned in the agreement entered into between the assessee and M/s.Elscope Pvt.Ltd. with which we are not concerned in this reference.

2. In the assessment framed u/s.143(3) read with Section 144B of the I.T. Act, 1961, the ITO brought to tax income from house property on notional basis in respect of certain properties transferred to M/s.Elscope Pvt. Ltd.. Further, he did not allow the assessee's claim for carry forward and set off of unabsorbed depreciation, development rebate and investment allowance of the earlier years on the ground that the assessee had ceased to carry on business during the year under reference. The ITO had also charged interest u/s.215 of the Act.

In appeal, following his order dated 29-2-1984 in the case of M/s.Sarabhai Chemicals Pvt.Ltd., the CIT (A) held that house property income cannot be brought to tax on notional basis. He, however, upheld the action of the ITO rejecting the assessee's claim for carry forward and set-off of unabsorbed depreciation and development rebate and investment allowance as well as charging of interest u/s.215 of the Act.

Thereafter, both the parties went in appeal before the Tribunal. The Revenue's grievance was against the deletion of house property income from the total income of the assessee, while the assessee was aggrieved by the decision of the CIT (A) upholding the action of the ITO in respect of unabsorbed depreciation, development rebate and investment allowance and interest charged u/s.215 of the Act.

In its order under reference, following its order in the case of M/s. Sarabhai Chemicals Pvt. Ltd., the Tribunal upheld the order of the CIT (A) in respect of deletion of the house property income and interest charged u/s.215 of the Act. Further, following the decision of this Court in the case of Deepak Textile Industries Ltd., 168 ITR 773, the Tribunal allowed the assessee's claim for carry forward and set-off of unabsorbed depreciation of earlier years. However, in respect of unabsorbed development rebate and investment allowance, the Tribunal upheld the order of the CIT (A).

3. On the aforesaid facts, the Tribunal has referred

three questions at the instance of the revenue and one question at the instance of the assessee for the opinion of this Court. The questions are as under:-

AT THE INSTANCE OF THE REVENUE:

(1) Whether, on the facts and in the circumstances of the case, the assessee was entitled to carry forward and set-off of unabsorbed depreciation?

(2) Whether on the facts and in the circumstances of the case, interest could have been charged u/s.215 of the I.T. ACT, 1961 ?

(3) Whether on the facts and in the circumstances of the case, the deletion of Rs.76,648/- on account of house property income was justified ?

AT THE INSTANCE OF THE ASSESSEE:

(4) Whether, on the facts and in the circumstances of the case, the assessee was entitled to carry forward and set-off of unabsorbed development rebate and investment allowance?

4. As far as the first question is concerned, our attention is invited to the decision of this Court in CIT vs. Deepak Textile Industries Ltd. (1997) 168 ITR 773 and the decision of the Apex Court in CIT vs. Virmani Industries Pvt. Ltd. (1995) 216 ITR 607.

In the aforesaid decisions, the Courts have taken the view that in order to avail of the benefit under Section 32(2) of the Income-tax Act, 1961, it is not necessary that the business carried on in the following previous year should be the same business as was carried on in the preceding previous year. In the absence of any words to that effect, no such requirement ought to be read into the said sub-section. Contrasting the provisions of Section 32(2) with the provisions of Section 72(1), the Courts have further held that in the following year the assessee need not carry on any business or profession for availing of the benefit of sub-section (2) of Section 32.

Applying the aforesaid principles to the facts of the present case, we have no doubt in holding that the Tribunal was right in taking the view that the assessee was entitled to carry forward and set-off of unabsorbed depreciation.

Accordingly, our answer to question No.1 is in the affirmative i.e. in favour of the assessee and against the revenue.

5. Coming to question No.2, our attention is invited to the decision of the Supreme Court in Central Provinces Manganese Ore Co. Ltd.vs. CIT (1986) 160 ITR 961 as applied by this Court in CIT vs. Gordanbhai Jethabhai (1994) 205 ITR 279 (Guj) and in Sarabhai Chemicals Pvt. Ltd. vs. CIT (2002) 173 CTR 193.

In the aforesaid decisions, this Court has followed the principle laid down by the Apex Court and has accordingly laid down the principle on construction of the provisions of Section 215 of the Act, that interest becomes payable by the assessee under Section 215 as a result of operation of law and it is not made dependent upon the discretion of the ITO. The discretion which is conferred upon the ITO is not in respect of determination of payability of interest but in respect of reduction or waiver of interest payable by the assessee. While deciding whether interest under Section 215 of the Act is payable by the assessee or not, what the ITO has to consider is whether the required conditions are satisfied or not, and at this stage is under no obligation to consider whether interest should be reduced or waived, which question would arise after the aspect of payability of interest is determined. The point of time when the ITO has to decide whether to reduce or waive the interest would be subsequent. His waiver or reduction of interest presupposes that the liability has been incurred by the assessee.

In view of the aforesaid principle, our answer to question No.2 is in the affirmative i.e. in favour of the revenue and against the assessee.

6. As far as question No.3 is concerned, our attention is invited to the decision of this Court in CIT vs. Sarabhai Chemicals Pvt. Ltd. (2002) 254 ITR 625 wherein following the decision of the Apex Court in CIT vs. Podar Cement Pvt.Ltd. (1997) 226 ITR 625 and the Full Bench decision of this Court in CIT vs. Mormasji Mancharji Vaid (2001) 250 ITR 542 it is held that the property cannot be owned by two persons, each one having independent and exclusive right over it. For the purposes of Section 22 of the Income-tax Act, 1961 corresponding to Section 9 of the Indian Income-tax Act, 1922, the owner must be "that person who can exercise the rights of the owner, not on behalf of the owner but in his own right". Hence, the liability to pay tax on

income from house property is clearly on the person who receives or is entitled to receive the income from property in his own right.

In view of the above, the Tribunal was justified in upholding the deletion of Rs.76,648/- on account of house property income.

Accordingly, our answer to question No.3 is in the affirmative i.e. in favour of the assessee and against the revenue.

7. Coming to the last question about carry forward and set off of unabsorbed development rebate and investment allowance, in view of the clear statutory provisions of subsection (5) of Section 32-A and also of subsection (4)(a) and subsection (5) of Section 155 of the Income-tax Act, 1961, as explained by the decision of this Court in Kalindi Investment Pvt. ltd. vs. CIT (1995) 213 ITR 207 and in view of the fact that the unit was transferred within 8 years from the date of purchase and installation of assets, it has to be held that the assessee was not entitled to carry forward and set-off of unabsorbed development rebate and investment allowance.

Accordingly our answer to question No.4 is in the negative i.e. in favour of the revenue and against the assessee.

8. The Reference accordingly stands disposed of with no order as to costs.

(M.S. Shah,J) (K.A. Puj,J)

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